Supreme Court, U.S.
FILED
001940 MAY 21 2001
OFFICE OF THE CLERK

No. ___ - ___

IN THE
Supreme Court of the United States

RICHARD E. FINLAN,

Petitioner,

vs.

DALLAS INDEPENDENT SCHOOL DISTRICT, SANDY KRESS, CHAD WOOLERY, HOLLIS BRASHEAR, WILLIAM KEEVER, LYNDA McDOW, KATHLEEN LEOS, YVONNE EWELL, LARRY FRIEDMAN, ALAN RICH, FRIEDMAN & ASSOCIATES, P.C., DENNIS EICHELBAUM, and SCHWARTZ & EICHELBAUM, P.C.

Respondents,

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

PETITION FOR WRIT OF CERTIORARI

RICHARD E. FINLAN
1131 Clermont Avenue
Dallas, Texas 75223
(214) 324-7557
Petitioner

39 pp

Question Presented

Whether the Petitioner has a protected right to be free of retaliatory lawsuits filed against him by government because of his exercise of First Amendment rights.

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RICHARD E. FINLAN,

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DALLAS INDEPENDENT SCHOOL DISTRICT, SANDY KRESS, CHAD WOOLERY, HOLLIS BRASHEAR, WILLIAM KEEVER, LYNDA McDOW, KATHLEEN LEOS, YVONNE EWELL, LARRY FRIEDMAN, ALAN RICH, FRIEDMAN & ASSOCIATES, P.C., DENNIS EICHELBAUM, and SCHWARTZ & EICHELBAUM, P.C.

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Opinion Below

The opinion of the Fifth District Court of Appeals at Dallas, Texas is reported at 27 S.W.3d 220. *See* Appendix pages 1 - 47.

Jurisdiction

The judgment of the Fifth District Court of Appeals was upheld and Finlan's Petition for Review to the Texas Supreme Court [00-1191] was denied. His Motion for Rehearing was denied by the Texas Supreme Court on March 15, 2001. This Court has jurisdiction to review the judgment of the Texas Supreme Court by writ of certiorari pursuant to Title 28, U.S.C.A. 1257.

Question Presented

Whether the Petitioner has a protected right to be free of retaliatory lawsuits filed against him by government because of his exercise of First Amendment rights.

Constitutional Provisions Involved

United States Constitution, Amendment I:

Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Statement of the Case

Petitioner, plaintiff below, is a resident of Dallas, Texas, a parent with children who attend Dallas Independent School District ("DISD") schools and, at all times relevant, an owner of DISD

tax exempt bonds.

In 1991, he discovered that DISD had manipulated the issuance of its long term tax exempt bonds in order to help a failing Dallas bank and that millions of dollars of DISD's bond fund proceeds were missing or could not be accounted for.

That year, after DISD withheld from public scrutiny documents concerning these improprieties, Finlan filed suit against DISD seeking declaratory judgment that the school district must open its records to the public and that it had misapplied its long term bond funds and had failed to use these funds for their intended purpose - the construction of schools. There was evidence that the school district had misapplied approximately $25 million of its bond funds to help the failing Dallas bank and that approximately $52.4 million in interest earnings on inactive bond funds were misapplied or missing.

The trial court appointed the Texas Commissioner of Education as master in the case and ordered that he audit DISD's use of its bond funds. The accounting firm hired by the Commissioner, Deloitte & Touche, confirmed that millions of dollars were missing or unaccounted for. This was prior to DISD's 1992 bond election asking the public for still more funds.

Once the audit was finished, Finlan announced that he would be opposing DISD's upcoming bond referendum until such time as "DISD could put its financial house in order."

On September 24, 1992, the DISD board of education held a secret meeting during which the board members and the school district's lawyer, Dennis Eichelbaum, set in action their plan to file a multi-million dollar lawsuit against Finlan. Appendix, pages 48 - 57

Their stratagem was to file a retaliatory lawsuit against Finlan to punish him for his criticism of the school district's finances, his suit which exposed the government's financial shenanigans, for Finlan's critical speech about the DISD in the Dallas media, and, importantly, to force Finlan to give up his vocal opposition to the upcoming bond election.

The school district's attorney, Mr. Eichelbaum, promised the board during the meeting that effect of such a suit would be to ruin Finlan's credit - a punishment for Finlan's First Amendment activities. Appendix - pages 50 - 51. Finlan's credit was in fact ruined by DISD's suit and he went out of business as a home builder.

In its final form, DISD's suit was a complaint alleging defamation of government which demanded millions of dollars because of Finlan's speech and an

additional $270 million if Finlan should do anything to cause DISD to lose its bond referendum in December, 1992. Appendix - pages 57 - 59. DISD's suit against Finlan was a typical government SLAPP[1] suit.

By May, 1993, the trial court, recognizing the illegitimacy of DISD's action, dismissed DISD's suit as a violation of the First Amendment and re-aligned Finlan, who had filed a counterclaim under 42 U.S.C.A. §1983, as plaintiff.

As Finlan's suit against the school district progressed, the board of education became disenchanted with their outside lawyers, Schwartz & Eichelbaum, P.C., and their lack of progress disposing of Finlan's civil rights suit.

By June, 1995, board member Sandy Kress had recruited new lawyers, defendants Larry Friedman

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[1] George W. Pring, SLAPPs: *Strategic Lawsuits Against Public Participation*, 7 PACE ENVTL. L. REV.3, 5 (1989); *see generally* Penelope Canan, *The SLAPPs from a Sociological Perspective*, 7 PACE ENVTL. L. REV. 23 (1989).
See also *Exercise of Constitutional Privilege: Deterring Abuse of the First Amendment - "Strategic Lawsuits Against Political Participation,"* SMU LAW REVIEW, Vol. 47, 95.

and Alan Rich, who promised the DISD board that, given adequate government resources, they could use renewed and more vigorous legal assaults against Finlan to force him to drop his original civil rights suit or to, at least, settle that suit on terms favorable to the government.

These discussions and agreements occurred during a secret DISD meeting on June 22, 1995. Pursuant to those discussions, the DISD board then passed the "June 22, 1995 Resolution," which officially hired Larry Friedman and his law firm to file new suits against Finlan to "resolve" his existing suit. Appendix - pages 60 - 61.

On September 1, 1995, Finlan wrote a letter to school superintendent Chad Woolery requesting campaign finance information held by school board members. On September 6, 1995, Mr. Friedman, representing the DISD and numerous school board members in their individual capacities, filed a declaratory judgment suit against Finlan asking for attorneys fees and costs because of Finlan's public information request. Appendix - pages 62 - 63. Again, Finlan counterclaimed, contending that his First Amendment rights (petition and speech) were violated by the government's retaliatory suit.

On September 13, 1995, Mr. Friedman filed, on behalf of DISD, a RICO, mail fraud, wire fraud and

civil conspiracy lawsuit against Finlan claiming that Finlan's original civil rights suit was an attempt to defraud the government. The petition asked for more than one $million in damages. Appendix - pages 64 - 66.

Finlan re-alleged that this campaign of retaliatory litigation was violative of his protected rights and that all of these suits were a tactical weapon by the government that were designed only to retaliate against him, to punish him, and to get Finlan to drop his original suit or, at least, to settle on terms favorable to the government.

Thereafter, in the hours before Finlan's motion for summary judgment, the government's racketeering suit was dropped and replaced by a new suit claiming civil conspiracy against Finlan.

The trial court 'cleared the courtroom,' granting all defensive motions for summary judgment and, essentially, dismissing all claims. The government appealed and Finlan cross-appealed.

The Dallas Court of Appeals Opinion

Appendix - pages 1 - 47.

The Dallas Court of Appeals, assuming, for purposes of its ruling, that all of the lawsuits filed against Finlan had been done for retaliatory purposes as punishment for his exercise of First Amendment rights, concluded that:

"there is no clearly established right to claim a First Amendment violation from the filing of a civil lawsuit, even one alleged to be malicious prosecution, in retaliation for the exercise of free speech rights."
Appendix - page 42.

The Dallas Court of Appeals decided Finlan's case on the threshold issue of standing, taking the position that Finlan had no right to be free of government retaliation and that his suit should be dismissed.

Based on this theory, governments would be allowed to use expensive retaliatory suits against citizens who, as Finlan did, petition their government or otherwise exercise First Amendment rights.

Summary of Argument

In this case, the Dallas Court of Appeals has decided an important federal question in a way that conflicts with relevant decisions of this Court and numerous Federal Courts of Appeals, including decisions of Finlan's home Circuit, the Fifth.

The Texas Supreme Court has sanctioned this departure of the lower court from existing federal law and, by doing so, necessitates this Court's supervisory powers.

It established a new and unique *"Texas Rule of*

Law" which simply eliminates and by passes federal rights. The *Texas Rule of Law* is particularly obnoxious in a republic because unencumbered political speech and the exercise of the right to petition government, free from retaliation is at the center of First Amendment protections.

The new *Texas Rule of Law* now allows governmental entities to target and retaliate against those who circulate petitions for signatures, voice criticism of government, request public information, write critical articles about government, file complaints or suits complaining of government conduct and a whole host of other previously protected First Amendment activities.

Most of all, the First Amendment protects speech, even the simple act of asking the government for public information, on matters of public concern and it should prevent the state from interfering with such activities. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

The new *Texas Rule of Law* disregards established principles of law that have been developed to prevent the kind of selective punishment of citizens that has occurred in this case. There are a wealth of cases that should have governed the ruling below, including *Mt. Healthy City School District v. Doyle*, 429 U.S. 274 (1977) where direct retaliation by the

state for having exercised First Amendment freedoms was proscribed by the Constitution and found actionable pursuant to 42 U.S.C.A. §1983.

It is undisputed that the decision to wage a campaign of retaliatory lawsuits against Finlan was both executive and legislative, where the government enacted the June 22, 1995 Resolution, not as a law of general application, but one which targeted Finlan by name for the goal of forcing him suspend his petitioning activity. The unconstitutional motivation of the government defendants is admitted by its own legislative action.

Additionally, the lower court completely overlooked the fact that Finlan was the target of retaliatory lawsuit because of his speech - his letter asking for public information - and the fact that, in Texas, it is illegal for government to sue an individual who asks for public information. *See* Texas Government Code §552.325(a).

Under the new Texas scheme, citizens can now exercise First Amendment rights only by placing themselves in a perilous situation where government has the right to retaliate once those rights are exercised.

ARGUMENT

Introduction

Retaliatory lawsuits by government have "chilling effect" on the exercise of First Amendment freedoms. The "chilling effect" is not only felt by the target but by members of the public who become aware of such retaliation by government. Defending a government SLAPP suit is an expensive economic sanction, time consuming, and a scary proposition since the outcome of such a suit is never certain. Even if the target prevails at the trial court, the government can perpetuate the economic punishment by continuing the case on appeal.

The court in *Johnson City v. Cowles Communications, Inc.*, 477 S.W. 2d 750, 754 (1972) succinctly pointed out the problem of retaliatory government lawsuits when it stated that "[I]t is difficult to imagine anything more destructive of democratic government than the power in the hands of a corrupt government to stifle all opposition by free use of the public treasury to silence critics by suit."

The Basics of the Texas court's opinion

The Texas opinion below erroneously relied on *Johnson v. Louisiana Department of Agriculture*, 18 F.3d 318 (5th Cir.1994), to conclude that government has the right to engage in a malicious criminal prosecution in retaliation for the exercise of First

Amendment freedoms. It then concluded that governments may also file retaliatory civil lawsuits against those who exercise First Amendment freedoms.

The Texas court decided the case on the threshold question (standing) of whether or not Finlan had any right at all to be free of government retaliation for the exercise of First Amendment rights.[1] Plainly, the court concluded that Finlan did have a right to speak and petition government but, once exercised, he had no claim under the constitution to be free of retaliation.[2]

Government retaliation now permitted in Texas

The Texas court relied on a single case to

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[1] "[T]he legal right at issue in this case is Finlan's right not to be subjected to a civil suit for allegedly exercising his free speech rights and for invoking his right to access the courts." DISD v. Finlan, 27 S.W.3d 220 (Tex. App.--Dallas 2000)

[2] "[T]here is no clearly established right to claim a First Amendment violation from the filing of a civil lawsuit, even one alleged to be malicious prosecution, in retaliation for the exercise of free speech rights." *Id.*

create this new theory of law that allows for government retaliation across the state of Texas, *Johnson v. Louisiana Dept. of Agriculture.* The Texas court's entire analysis of *Johnson*:

"[T]he operator of a defunct crop dusting business brought a section 1983 action against the Louisiana Department of Agriculture and its commissioner, contending that they had violated his First Amendment rights by bringing a series of administrative proceedings against him and his business. The trial court held that these allegations failed to state a claim under section 1983 for violation of the plaintiff's First Amendment rights, and the Fifth Circuit affirmed. *Id.* at 321. The court first noted that if plaintiff's allegations asserted a claim on any basis, 'the claim is one for malicious prosecution in violation of Johnson's First Amendment rights.' *Id.* at 320. The *Johnson* court then observed that '[w]hether the Constitution comprehends any such claim *is far from clear.*'" *DISD v. Finlan* 27 S.W.3d 220.

Aside from the misinterpretation of *Johnson*, it is a misstatement of constitutional principles to conclude from *Johnson* that the Bill of Rights no longer enjoy constitutional protection from government retaliation.

New limits on the right to petition government

Additionally, although the Texas court below

did concede that Finlan's right to petition government was a well established right, *citing* Roland v. Shapiro, 708 F.2d 967, 971-72 (5th Cir. 1983), the Texas court severely altered the scope of the constitutional right of petition, *citing* Foster v. City of Lake Jackson, 28 F.3d 425, 429 (5th Cir. 1994), by concluding that the right in question was facilitative only - that, as long as the plaintiff was able to file his petition in the courthouse, there could be no violation of the plaintiff's right to petition when government takes retaliatory actions against him for having done so.

Elimination of the 1983 remedies for malicious prosecutions done in retaliation for First Amendment exercises

Then, continuing to create constitutional doctrine out of whole cloth, the Texas court concluded that, since Finlan had, indeed, filed this suit, his filing of a civil rights suit extinguished his own civil rights claim. If this doctrine were allowed to stand, it would create an anomaly whereby 42 U.S.C. §1983 would only vindicate the rights of people who never sue.

Discussion

As noted above, the Texas court relied heavily on *Johnson v. Louisiana Dept. of Agriculture*, 18 F.3d 318 (5th Cir. 1994) to fashion its theory that Finlan has no right to be free of retaliatory lawsuits by

government for the exercise of First Amendment rights. *Johnson* was a Fifth Circuit case where Johnson, who was found guilty on numerous occasions on criminal complaints (including assault), filed suit alleging that he was actually the object of malicious criminal prosecutions because of his speech. Although Johnson initially claimed First Amendment retaliation, he was ordered by the trial court to replead this cause of action and he did not do so, which resulted in its dismissal. His First Amendment claim was not thereafter addressed by the Fifth Circuit.

However, Johnson continued to embellish his, essentially Fourteenth Amendment due process claim[2], with allegations that his earlier criminal prosecutions were done solely because of his speech critical of Department of Agriculture personnel. The court in *Johnson*, correctly recognizing that the plaintiff's First Amendment allegations would not lie under the Fourteenth Amendment, opined that a complaint possibly could be made if he asserted a violation of a specific provision of the Bill of Rights (the Fourth

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[2] Due process violations are regulated to the states and do not rise to the level of constitutional tort. Without his First Amendment retaliation claim, Johnson was in the wrong courthouse.

Amendment) but, first, Johnson would have to prove that he was innocent of all charges. Johnson, who had already been found guilty, could obviously not do that.

Simply put, the Texas court misread *Johnson* to mean that governments can engage in retaliatory criminal or civil prosecutions for the exercise of First Amendment freedoms. As a result, the Texas court misstated constitutional law.

The point of the *Johnson* case is that due process considerations (not to be confused with substantive due process claims which are federal issues) like the manufacturing of evidence claimed by Johnson are due process complaints which the states must enforce. Thus, *Johnson* is in agreement with *Paratt v. Taylor*, 451 U.S. 527 (1981) because it recognizes the principles of federalism and the traditional sovereign prerogative of a state to define for itself the tort rules governing its own conduct. Recognizing that Johnson only had a state law claim, the *Johnson* court correctly opined that he would have to demonstrate the elements of the state common law tort of malicious prosecution and, importantly, demonstrate that he was not guilty of the charges brought against him.

Clearly, *Johnson* is distinguished from this First Amendment retaliation case and its misuse by the Texas court to create a new constitutional theory

which allows retaliation by government should not be allowed to stand.

Censorship and Sanctions

In this case, motive of the defendants has never been a question; the school board hired a new, more aggressive, legal team to file suit after suit against Finlan in retaliation for his speech and in an attempt to force a settlement of Finlan's original civil rights case. One board member, Dan Peavy, testified that "[T]his was done to burden Finlan with new lawsuits and force [him] to settle the Civil Rights Suit on our terms." The suits filed against Finlan in this particular case and the many others that were filed against him materially damaged Finlan's career path as a home builder[3] and 'chilled' his speech. Under this new Texas rule, Finlan can no longer even entertain the idea of participating in a public debate for fear that he would have to defend yet another government financed civil suit.

The theory of "self government"[4] which was advanced so many years ago by this Court has been,

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[3] As Mr. Eichelbaum, the school district's attorney, told the board about government lawsuits: "What that means to [Finlan] is, [he] can't get loans . . . pending that lawsuit. [His] credit line is shot." App., pg.50-51.

[4] *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

to a considerable degree, chilled or destroyed in North Texas. As word spreads of the decision below, more citizens will think twice about the exercise of First Amendment freedoms and, more often than not, will engage in self-censorship rather than incur the economic sanction of having to defend a retaliatory government suit.

The First Amendment rights at issue in this case, the right of speech and the right to petition government for redress of wrongs, explain the central meaning of the First Amendment and the essence of self government.

The First Amendment assures the American people of the right to obtain the necessary knowledge to govern themselves. And, of course, DISD public officials feared that Finlan's request for campaign information would lead, perhaps, to the revelation of irregularities. But the foregoing fact scenario demonstrates that Finlan was singled out for retaliatory lawsuits for a more overriding purpose - to overwhelm Finlan with the expense of defending costly retaliatory suits demanding huge amounts of attorneys' fees and damages designed to make him drop and or settle his existing suit against the government.

These acts and their malicious and unconstitutional nature step over the line of

Finlan's First Amendment freedoms and extend into his substantive Fourteenth Amendment right to be free of government oppression, intimidation, and intentional harm. *See Wolff v. McDonnell*, 418 U.S. 539 (1974). Singling Finlan out for such an expensive government assault, the government actors abandoned their traditional discretionary and legislative capacities to do Finlan harm to force settlement of his earlier suit. Substantive Fourteenth Amendment rights are implicated where there is an "abuse"[5] or misuse of power, or when the government defendants' conduct was "severe,"[6] "reprehensible,"[7] or "egregious."[8] Substantive Fourteenth Amendment rights are intended to prevent the type of abuse of power by

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[5] *See, e.g., Willaims v. Kelly*, 624 F.2d 695, 697 (5th Cir. 1980), cert. denied 451 U.S. 1019 (1981).

[6] *See, Tefft v. Seward,* 689 F.2d 637, 639n.1 (6th Cir. 1982).

[7] *See, e.g., Rutledge v. Arizona Bd. of Regents*, 660 F.2d 1345 (9th Cir. 1981) aff'd on other grounds, 103 S.Ct. 1483 (1983).

[8] *See, e.g., Hull v. City of Duncanville*, 678 F.2d 582, 584 (5th Cir. 1982).

government officials and oppression demonstrated in this case. *See Collins v. City of Harker Heights, Tex.*, 503 U.S. 115 (1992); *Rochin v. California,* 342 U.S. 165 (1952); *Daniels v. Williams,* 474 U.S. 327 (1986).

Finlan's right to petition government is intimately connected, both in origin and in purpose, with his right of free speech and is a right which is clearly and emphatically established in constitutional jurisprudence. *See California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508 (1972); *United Mine Workers v. Illinois State Bar Ass'n,* 389 U.S. 217 (1967); *Gitlow v. New York,* 268 U.S. 652 (1925); *United States v. Cruikshank,* 92 U.S. 542 (1875); *McDonald v. Smith,* 472 U.S. 479 (1985); *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

Additionally, numerous cases have held that the right of free speech prohibits government suits designed to retaliate for the exercise of this freedom. *See Johnson City v. Cowles Communications, Inc.*, (1972) 477, S.W.2d 750; *State v. Time, Inc.* (LaApp. 1971) 249 So.2d 328; *City of Albany v. Meyers*, (1929) 99 Ca.App. 651, 279 P. 213; *City of Chicago v. Tribune Co.*, (1929) 307 Ill. 595, 139 N.E. 86 quoted with approval in *New York Times Co. v.*

Sullivan, 376 U.S. 254 (1964).

It is, or should be, settled that direct retaliation by the state for having exercised First Amendment freedoms in the past is proscribed by the Constitution and is actionable pursuant to 42 U.S.C.A. §1983. *See Mount Healthy City School District v. Doyle*, 429 U.S. 274 (1977); *Elrod v. Burns*, 427 U.S. 347 (1976); *Cohen v. California*, 403 U.S. 15 (1971).

The Fifth Circuit, as well as others, make it clear that state actors may not take retaliatory action of *any kind* against an individual designed either to punish him for having exercised his constitutional rights or to intimidate or chill his exercise of that right in the future. *See Lamar v. Steele*, 693 F.2d 559, 562 (5th Cir. 1982), *cert. denied* 464 U.S. 821 (1983); *Rolf v. City of San Antonio*, 77 F.3d 823 (5th Cir. 1996)(condemnation suit in retaliation for speech); *Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310 (9th Cir. 1989); *Deerfield Medical Center v. City of Deerfield Beach*, 661 F.2d 328 (5th Cir. [B] 1981); *Harrison v. Springdale Water & Sewer Commission*, 780 F.2d 1422 (8th Cir. 1986)(retaliatory lawsuit); *Greenwich Citizens Committee v. Counties of Warren*, 77 F.3d 26 (2nd Cir. 1996); *Garland v. Polley*, 594 F.2d 1220 (8th Cir. 1979); *Hall v. Sutton*, 755 F.2d 786 (11th Cir. 1985); *Matzker v. Herr*, 748 F.2d 1141

(7th Cir. 1984); *Milhouse v. Carson*, 652 F.2d 371(3rd Cir. 1981); *Bradley v. Pittsburgh Bd. of Education*, 910 F.2d 1172 (3rd Cir.1990)(retaliation for filing of lawsuit); *White v. Napoleon*, 897 F.2d 103 (3rd Cir. 1990); *Anderson v. Davila*, 125 F.3d 148 (3rd Cir. 1997)(retaliation for filing lawsuit will support §1983 claim); *Silver v. Cormier*, 529 F.2d 161 (10th Cir. 1976); *Hudspeth v. Figgins*, 58 F.2d 1345 (4th Cir. 1978), *cert. denied* 441 U.S. 913 (1979); *Cate v. Oldham*, 707 F.2d 1176 (11th Cir. 1983). *See also City of Long Beach v. Bozek*, 645 P.2d 137 (CAL 1982), *cert. granted* 103 S.Ct. 712 (1983); *Miami Trace Local School District v. Martin*, 217 N.E. 2d 712 (1966)(suit instituted by a board of education against taxpayer and his attorneys who had previously instituted suit against board to enjoin proposed sale of bonds).

"[T]he First Amendment protects the right of an individual to speak freely . . . and to petition his government for redress . . . The government is prohibited from infringing upon these guarantees either by a general prohibition against certain forms of advocacy . . or by imposing sanctions for the expression of particular views it opposes." *Smith v. Arkansas State Highway Employees*, 441 U.S. 463 (1979).

The Texas opinion is an oxymoron because it

recognizes the "well established" First Amendmentright of petition, citing *Roland v. Shapiro*, 708 F.2d 967, 971-72 (5th Cir. 1983) and *Wilson v. Thompson*, 593 F.2d 1375, 1387 (5th Cir. 1979), but then goes on to state that Finlan has no right to be free of retaliation when he exercises such rights. This can not be. The First Amendment would not be a protected right if government is free to retaliate. The Texas opinion misstates federal law.

Additionally, the Texas opinion, attempting to bolster its position that retaliation was permissible, wrongly interpreted Finlan's right of petition as being no more than facilitative in nature. The Texas opinion, relying on *Foster v. City of Lake Jackson*, 28 F.3d 425 (5th Cir. 1994), opined that the right of petition only meant that an individual could get to the courthouse, pay his filing fees, and file his suit. It went on to state that, since Finlan has not shown that "his ability to file suit was in any way delayed or blocked altogether," and that, since "he has been a frequent party to litigation against DISD Trustees," "Finlan's constitutional right to access to the courts was not violated."

The Texas opinion misreads *Foster* and results in a misstatement of federal law. *Foster* was a case involving parents who had previously settled a wrongful death action with the city.

They sued alleging that city officials conspired to deny them access to the courts by concealing evidence during discovery (discovery abuse), thus, causing them to settle the case for less. The city alleged that, at the time of the alleged conduct (1985-1988), the right of access to the courts did "not encompass a right to proceed free of discovery abuse by a governmental entity. . " *Foster,* 28 F.3d at 429. The court in *Foster*, dealing with the narrow issue of discovery abuse, stated that the right of access to the courts (between 1985 and 1988) is only implicated "where the ability to file suit was delayed, or blocked altogether." *Id.* at 430. Overlooking pertinent Fifth Circuit case law that established Finlan's right to be free of retaliation[3], the Texas court severely restricted the right of petition and misstated federal law.

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[3] *See Hale v. Townley*, 19 F.3d 1068 (5th Cir.1994), *modified*, (5th Cir. May 13, 1994)("[T]he right of access to courts, free of retaliation, is a right recognized under, and protected by, the First Amendment."); *Crowder v. Sinyard*, 884 F.2d 804 (5th Cir. 1989), *cert. denied*, 496 U.S. 924 (1990)(if state officials in some way retaliate against an individual for seeking redress through the courts, they have violated that person's right of access to the courts.).

Foster, like *Johnson* above, is another Fourteenth Amendment due process case which deals with the fairness of procedure (due process) not substantive rights found in the Constitutional Amendments. Due process violations, like the discovery abuse described in *Foster*, do not rise to the level of constitutional tort. The Fourteenth Amendment enforces observance of due process on the states and, indeed, state laws provide recourse for violation of courtroom procedure.

Thus, *Foster* is distinguishable from the case at bar and the Texas opinion misstates federal law and wrongly diminishes the right of petition for all Texans.

Still relying on its misunderstanding of *Foster*, the Texas opinion goes on to opine that Finlan, by filing his case under section 1983, actually extinguished his own cause of action. This means that in Texas where the complaint is that government filed a retaliatory lawsuit against a citizen for the exercise of free speech rights, particularly the right of petition, the plaintiff must always be dismissed because, according to the court below, his own suit proves there is no violation of the right of petition.

The Fifth Circuit has previously dealt with the anomaly expressed in the Texas opinion in *Lamar v. Steele* 693 F.2d at 562 (5th Cir. 1982). The Fifth Circuit states:

"[T]he (plaintiff's) reaction to the threats (of retaliation) is . . immaterial. It is not necessary to show that the (plaintiff) succumbed to the threats as a predicate for securing §1983 relief. The Contrary rule would result in the anomaly of protecting only those individuals who remain out of court."

Thus, the new rule set forth by the Texas opinion misstates federal law where it takes the stance that Finlan can not file a section 1983 case complaining about violation of his right of petition because the mere filing of his case in the courthouse would extinguish his own claim.

By permitting retaliation for the exercise of First Amendment freedoms, the new Texas rule suppresses such rights by granting unconstitutional power to local government.

In *New York Times*, supra., this Court opposed compelling the critic of official conduct to guarantee the truth of his assertions on pain of libel judgments in virtually unlimited amounts. The principle recognized by the Court is that, under the American system, the power is in the people over the government, and not in the government over the people. This is the foundation upon which self-government is laid.

For millions of Texans, the Texas opinion has laid waste to this fundamental American principle and now the prospect and fear of damage awards from

retaliatory government suits makes possible what Texas governments were previously unable to command.

Although Finlan was the target of many more retaliatory suits than the ones discussed here, this case and the original $280 million suit against Finlan for defamation of government demonstrate how quickly the power to sue in the hands of corrupt government officials can get out of hand. The fear of civil suits is their great power to punish financially. Civil suits by government can be filed, dropped, re-filed, and appealed, entangling the government's target in a web of debilitating and costly litigation.

The government's additional punishment is found in the disclosure the target must give to his banker once he becomes a defendant of a government suit asking for damages or attorneys' fees. That disclosure, required by federal law, completely undermines the target's financial standing and he soon finds that he must not only bear the cost of defense of the retaliatory government suit, but must bear the mutilation of his credit reputation. That situation for Finlan was crippling - his career as a small home builder is but a memory.

The cost to society accumulates as more citizens learn of the Texas rule allowing governments to retaliate. In such an atmosphere of fear and

timidity imposed by the Texas opinion, self-censorship will dampen the ardor of all but the most resolute.

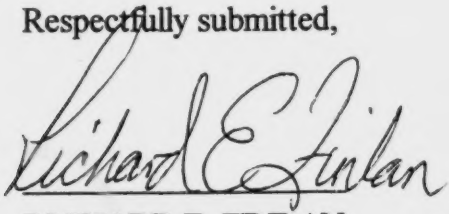
Retaliatory lawsuits against those who exercise First Amendment freedoms have reached epidemic proportions across the nation. California and New York have passed legislation designed to quell abuse of these freedoms by retaliatory suits.

Finlan, who has been subjected to government suits based on his exercise of First Amendment rights has been sued for nearly one third billion dollars. But such huge claims of damages or attorneys' fees are not necessary to dissuade average citizens from exercising their rights. Just the prospect of being sued and having to pay a lawyer a $5,000 retainer to defend a government suit is all that is necessary to convince most that they want no part of free government-critical speech in the future. This Court will never hear about most of these assaults on First Amendment freedoms because, once the government suit is filed or threatened, most will agree to stop their First Amendment activities in exchange for a non-suit of the government case.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted,



RICHARD E. FINLAN
1131 Clermont Avenue
Dallas, Texas 75223
(214) 324-7557
Petitioner